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ABSTRACT

In the field of higher education, more and more cases of race and sex discrimination are going to court. This speech indicates why this may be happening, why the trend is a disturbing one, and how cases can be gotten out of the courts. Costs, time loss, and the personal degradation of the litigation process are cited, and the complex problems that lead to litigation are discussed. Emphasized is the need for a balance between objective criteria and subjective decisions regarding hiring, promoting, and firing. (LBH)

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Department of Justice

TRANSCRIPT

OF

SPEECH

BY

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AT

ABA NATIONAL INSTITUTE ON THE LAW
OF EEO AND DISCRIMINATION
IN INSTITUTIONS OF HIGHER EDUCATION

RE:

AFFIRMATIVE ACTION IN HIGHER EDUCATION

ON

NOVEMBER 5, 1976

U S DEPARTMENT OF HEALTH,
EDUCATION & WELFARE
NATIONAL INSTITUTE OF
EDUCATION

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In the field of higher education, more and more cases of race and sex discrimination are going to court. I want to indicate to you today why I think this is happening, why it is that this trend is a disturbing one, and how we can get cases out of the courts.

There is no field in which there is a greater degree of agreement that court litigation is inappropriate than in the field of higher education. There are several sharp characteristics that indicate that there are difficulties in trying to resolve these questions in court.

First of all, the process -- as you as lawyers know, and you who are not lawyers know even better -- the process is very long and very expensive. Time erodes the parties' rights, whether it is the university's rights or whether it is the complaining party's rights. Positions tend to harden with time so that we end up finding both the university and the complainant taking positions that are based more on the polarity that is inherent in litigation than upon the common sense or the merits of either position. Delays interrupt or side-track careers and debilitate university resources in time and in money.

Litigation is uncomfortable. It puts participants on a defensive plane that frankly makes them behave badly, and sinks

them to a level of discourse that frankly degrades their reputations together. The facts typically raised in an adversary context unnecessarily damage individual careers; unfortunately, we end up litigating issues that are unrelated even to the issue of Title VII, and it happens all the time.

Equal employment opportunity litigation is ordinarily a process of comparing the qualifications of the litigants with others, which means that some are better and others worse. That exposure process in a public forum involves not only the litigants but a wide number of people, so that a wide group of people end up having an exposure which is not only uncomfortable but sometimes damaging, and which in the ordinary course of human events would not have to happen. Equal employment opportunity litigation, whether justified or not, is always a difficult thing for people to go through.

Lawyers and judges are not very comfortable dealing with these problems, and there are reasons for that. I don't think they are the best people to be dealing with them. The judgment of academic qualifications often requires an expertise which they frankly do not have. And where there is substantial doubt that relative academic qualifications can be fairly resolved, the judicial process tends to turn away from the merits toward procedural niceties,

in order to escape the difficult and perplexing process of trying to determine what comparative merit really is. That turn toward procedural matters which is well-known to lawyers as a way of resolving things, may be fine in a commercial context, but it is not the way to resolve the central issues in dispute in this field. Yet the subjectivity involved in many academic employment decisions is difficult to distill into objective truth in a courtroom.

Why are these cases in court, then, given virtually everyone's agreement that this is not an ideal setting for insuring fair treatment? Primarily because other mechanisms do not exist or are failing and the courts must be available as a last resort to protect individual's rights. A related complication is that institutions of higher education use subjective standards for professional employees in hiring, promotion, and the granting of tenure. This whole question of subjective criteria versus objective criteria is one which cannot be dealt with in the context of this speech. I notice it has been the subject of discussion at this conference, as it has been in many other conferences as well. But I would say that there are two ways to approach this issue. One is to strive for objective criteria, to reduce the criteria for promotion and hiring to a set of rules that lend themselves to objective, perhaps even mechanical application. That I don't think is possible. I am not one who advocates that. The nature of academic qualifications and teaching in particular simply

do not lend themselves easily to qualification of that kind.

A second approach is to admit the difficulty of making criteria objective, but to go on and say that total subjectivity is equally wrong. There needs to be a balance point, a way of stating standards and criteria openly, even if they are stated generally, and having done that -- which I hasten to add too many universities, even after years of litigation in this field have not done -- go on and say that whatever "play in joints" this may allow, whatever degree of flexibility and discretion these generally stated criteria allow will not be exercised differently for white males on the one hand, and for minority males and women on the other. In other words, admit the need for the flexibility inherent in some degree of subjectivity, but also make clear that flexibility is a two-way street. Just as all of us sitting in this room know that universities for years have taken chances, "bent rules," and allowed flexibility to play on behalf of white males, so should flexibility operate on behalf of women and minority males, too. It is somewhat suspicious that only since women and minorities have applied has this enormous concern for standards arisen.

The question of whether there is a need for subjectivity and "educated guesses" will continue to persist, as will the view that objective measurements are hard to find and apply. Again I say that this view is exaggerated, and that it is possible

at least to state criteria generally. In the absence of doing so, and striving for the articulation of criteria, academic "insiders," so to speak, are allowed to protect their own. They tend to use subjectivity as a basis for differing friends from non-friends. And that is the first reason so many of these cases are going to court.

Another reason is that women and minority males do not have adequate information with which to decide whether or not they truly have been rejected on the merits or are the victims of discrimination. When you have highly subjective standards, inevitably you are going to have different articulations of the standards and the reasons for acceptance and rejection. Universities, however, frequently fail to articulate either the standards or the basis upon which those standards have been applied in a given case. There cannot be any place where there has been a greater need for more candor than in the field of higher education employment decision-making.

In the absence of candor and care, standards frequently change in mid-stream, in the middle of the employment decision-making process. One recent example that we had in our office was of a woman teaching in a university English department who was denied tenure on the grounds that the department already had enough tenured professors in her particular specialty. After she was able to demonstrate that the review committee had mistakenly

put her in the wrong field of specialization, the committee re-convened and announced that she did not merit tenure because of "poor service to the university," including failure to keep enough office hours for students. Then the equal employment opportunity committee of the university found that this woman had been treated arbitrarily and recommended to the president that she be granted tenure. The president in response simply sent the matter back to the original committee, which then came up with still a third reason for denying her tenure.

Now for this woman to bring suit is not surprising. You as lawyers will recognize immediately that regardless of the merits, regardless of what her capability was, for the university to engage in this catch 22 procedure is inevitably going to invite litigation. Regardless of your inclinations on the merits, lawyers who look at the procedural irregularities here would advise the complainant to sue, and would tell the university that they had a big problem. This happens all the time. Persons are hired and rejected who are not adequately informed of the applicable standards, and not told how they have been or will be judged when it comes to decisions made by the relevant committee.

Being left in the dark tends to generate a sense of frustration and a belief that there is something other than the merits operating. Most people who apply for a job have some degree of respect for

their own capabilities. Quite naturally and humanly they are going to look to causes for disappointment that lie outside themselves. That should not come as a surprise to us, yet frequently university employers seem to assume that an individual who is turned down will implicitly understand that lack of merit is what caused the denial, not some other invidious factor.

The irony of this is that complaints of "reverse discrimination" against whites lead them to just the opposite conclusion. If you are a white male and you have applied for a job and have been turned down, then for some reason we have now reached the point where we assume just the opposite of what we assume when a woman or a minority male is turned down. In the latter case, we assume it is lack of merit, and why doesn't that person understand its a matter of merit? But if it is a white male turned down, we assume that he was turned down because of quotas or goals, that he was perfectly well qualified, but that a woman or minority male must have taken his place.

In my experience quite the opposite has been the case. Usually the university employers making these decisions have chosen the woman or the minority male because merit prevailed, because the capabilities were there, because the university did not, as sometimes is alleged, choose to "debase" itself by taking someone who couldn't do the job. But where a white male lacking qualifications is involved, instead of delivering that news quite candidly and

honestly to the applicant, the university will say "Gee, we would love to have had you, you look terrific, you have all of the qualifications, you've been in the business a long time, but you know those bureaucrats at HEW, EEOC, and the government. They're making us take these women and minorities. We are really sorry."

Now that kind of statement is shameful, and it happens too many times. It is precisely the kind of dishonesty that is going to lead to a lawsuit. Even worse than that, it will generate unrealistic expectations in the complainant, and unfair judgment in the community that the woman or minority male who deservedly got the job did so because of sex or race, with lesser qualifications.

Hiring and promotion statistics raise reasonable suspicions of discriminatory practices and this is still another reason that we are finding more and more complaints. If you have a disproportionately high number of women in lower ranks, with lower pay, this statistic alone, although it does not make a case of discrimination, will certainly generate a strong suspicion that discriminatory devices or practices are causing the imbalance, and may generate a probing lawsuit that leaves the university scratching its collective head in wonder. But should the university really be so perplexed?

The next reason we see more litigation is because responsibility for nondiscrimination is frequently very diffused at the university level, and typically very unclear. While equal employment is everybody's business, it cannot be nobody's responsibility. While high administration officials are ultimately responsible for equal employment opportunity programs, unless persons making the day-to-day decisions are held responsible, no one will make the hard decisions.

What we are seeing frequently is a syndrome of neglect that leads to litigation. You find a university president will turn to a member of his staff and say "Get me a black woman with a Spanish-surname who has an Indian in her family, and make sure that she runs the equal employment opportunity program. We will have a big announcement about it, and make sure she gets some coverage by the college newspaper and then don't bother me until next year." That program, that granting of responsibility without power is doomed to failure. I have not yet seen it work once in the years I have watched it. Unless the university administration, including the president, the general counsel, you as lawyers and other decision-makers, intimately involves itself on a current basis with the problems that are being dealt with and not being dealt with, there is going to be a breakdown of the process. Inevitable tensions that arise on campus will place too much responsibility, and too much of an impossible burden on the backs of those who are not really in a position to make the problem solving decisions. A person

who is in the position of moderating, investigating and conciliating can have his or her recommendations reversed only so many times before his credibility is entirely lost, and the EEO process itself is badly damaged.

In addition, officials accused of discrimination often behave irrationally in the face of a charge, thereby further exacerbating the problem and leading the complainant to an increased suspicion that there has been a violation. For some reason all of us seem to react very strongly to any charge of discrimination where we would not react so strongly or irrationally to a charge of something equally heinous. We find ourselves becoming very personal very quickly. The rumor mills begin and the issues go well beyond that of Title VII. The matter quickly escalates beyond defensiveness to the involvement of lawyers, the use of irrational process against the complainant and indeed the use of litigation itself even when it is wildly premature. It becomes a self-fulfilling principle that if litigation is a possible defense, it had better be used. Then each side builds visions of out-maneuvering the other, of raising the ante, of using a little more power over the other to try to intimidate and win. Everything is done in the name of principle, and the courts become the battleground for what amounts to holy crusades. But superior resources lie with the university in most cases, and if it does not use them carefully and fairly, it stands to lose in esteem what it gains at the bar. It does not go unnoticed when a university chooses to

fight meritorious claims as well as strike-suits, or to waste and flail when it should conserve and deliberate.

I think there are other reasons that we are seeing this trend toward litigation, and it is important as lawyers to understand why this trend is taking place and how to turn it around.

I think there are two ways to get universities out of court. One is to stop discriminating, and the second is to stop appearing to discriminate.

Let me take the latter first, if I may. Ordinarily, if you give full information on the reasons for adverse employment actions you will find that there is a greater willingness by the applicant to accept the decision, and a greater generosity of spirit on the part of minorities, women, and civil rights groups than most university people believe. The charge is made that to be open and honest is simply to give ammunition to irrational, unfair people who are bent on making trouble at the university regardless of the truth. There are times in every movement when that happens, when the heat of motion toward establishing its goals subordinates flexibility or the appearance of weakness that comes with rational compromise. But in my humble opinion, we are past that point in the field of higher education. We are at a point where women and minority males are not trying to demonstrate a point, or pass a law. The law exists. They are not looking to establish personal

belief in a general philosophical vain. What they are looking for is fair treatment. They are looking to be hired and promoted on an equal basis as individual people. If we recognize that point, then to deal with the merits openly actually keeps the university out of trouble rather than fueling the fire for more litigation. There has to be a sense of eveness and no one can better advise universities on fairness and eveness in my judgment than lawyers. There needs to be a system by which you plan ahead and calculate the impact of today's actions on the overall profile of the university. There needs to be quick action and firm action when there are signs of trouble. Universities can no longer afford delay in the hope that the problem will go away with the drift. Those days are gone. The law is clear and people know their rights. They are not simply going to forget them, or let them die under the supposed suspicion that perhaps they are wrong.

There needs to be equal employment opportunity machinery that is credible, and that has the authority and powers that provides procedures that are unchallengeably fair, and provides that those procedures are administered by an expert staff. I have often heard concern that the cost of good equal employment opportunity machinery is prohibitive. Yet without having done a Rand Corporation analysis, I suspect that if one calculates the expense of litigation against the expense of preventive action and machinery, the costs of litigation would far out-strip the latter.

There needs to be a fixing of responsibility for personnel actions to avoid anonymous committee decisions and to make sure that the powers of review, and the authority for those powers, are explained to the university community as a whole. There needs to be a meaningful affirmative action program that will identify statistical disparities as possible troubling signs. We were talking before about Ph.D's in certain fields, and one of my colleagues here pointed out that a few years ago there were only three black Ph.D.'s in the field of geology. To see that there is a racial disparity in a given geology department would indicate a problem. To know that there are so few blacks in that field may explain the disparity. But one has to ask the question openly before an answer can be established. In other cases disparity will not be explained by a lack of market availability, but by something discriminatory.

Discriminatory activity may be operating not as official policy on the part of the university, but even without the president's knowledge. Learn why disparities exist. Eliminate unnecessary barriers to access to jobs. Identify sources of minority and female candidates and aggressively recruit those sources without prejudged limitations on the availability of people. Pause before you litigate and pause before you counsel your university to litigate. Don't let lawyers make all the

decisions. Those of you who are here, I would have to assume, are the cream of the crop of lawyers who have sensitivity in this field. In my experience, most lawyers are not sensitive to the nuances and difficulties of solving problems in this field.

Be prepared to compromise. There is in no other field which I have seen where people are ready to claim principle as justification for poor judgment more quickly than in the field of higher education. Here again lawyers can be immensely helpful, because we know something about the value of compromise, for better and for worse. Search for alternative solutions and ask whether the litigation proposed is merely "face saving," or is really designed to protect the integrity of the institution.

Don't decide to litigate because cost comes from other budgets, as we have seen happen. Forget about that. Don't allow litigation to become a form of extension of the internal warfare of the university. Woodrow Wilson once said something to the effect that politics of the Presidency were small compared to politics of the university. Don't allow that to dictate litigation in this field.

Avoid personal attacks if possible. I don't think it is entirely possible, but perhaps you can minimize it by sticking to the merits of the charges, and by at least considering the possibility that the charges might have been made in good faith.

There is usually an assumption that they were not. Don't assume that the charge is a personal attack on someone in the institution.

Find out the facts as soon as a complaint is made. Don't wait for an enforcement agency like Justice, FTW or EEOC to make its finding first. One has to have good investigators. They ought to be used immediately. They ought to be used with the full support of the institution.

Finally, picking up where we began, encourage the openess of those who have the facts to discuss them as fully and freely as possible within the context not only of the complaint involved, but of the university's attitude toward equal employment opportunity generally.

Thank you.